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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1501

KELLOGG COMPANY,
Petitioner,

— against —

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONER KELLOGG COMPANY SUGGESTING THE POSSIBILITY OF MOOTNESS

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In its Petition for a Writ of Certiorari, petitioner Kellogg Company ("Kellogg") presented to this Court important questions of administrative law and procedure raising a fundamental issue of due process, the resolution of which will have widespread ramifications throughout the federal administrative system. Kellogg also noted that Michael Pertschuk, Chairman of the Federal Trade Commission ("Commission"), recused himself from the Children's Advertising proceeding, but that such voluntary cessation of allegedly illegal conduct did not render moot the questions presented to this Court.

In their opposition brief respondents did not challenge any of these contentions. Instead, they merely argued that

the majority opinion of the court below was correct and that the dissenting opinion and the district court opinion were wrong. The issues involved in that argument have been fully treated in Kellogg's petition and need not be reviewed again in this reply.

However, recently enacted legislation gives rise to the possibility that the case before this Court may now be moot. Two months after the petition for certiorari was filed, the President signed into law the Federal Trade Commission Improvements Act of 1980, Public Law No. 96-252, which became effective on the date of enactment. Pub.L. No. 96-252, Section 23. Public Law No. 96-252 contains a provision, Section 11, specifically directed towards the Children's Advertising proceeding.[1]

Section 11(a)(1) of that Act provides that the Commission shall not promulgate any rule in the Children's Adver-

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[1]COMMISSION RULEMAKINGS RELATING TO CHILDREN'S ADVERTISING; PUBLICATION OF TEXT OF PROPOSED RULES

SEC. 11. (a)(1) Section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) is amended by adding at the end thereof the following new subsection:

"(i) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commision Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.".

(2) Section 18(a)(1) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)) is amended by striking out "The" and inserting in lieu thereof "Except as provided in subsection (i), the".

(3) Section 18(b)(1)(A) of the Federal Trade Commission Act, as so redesignated in section 8(a), is amended by inserting after "particularity" the following: "the text of the rule, including any alternatives, which the Commission proposes to promulgate, and".

(b) The Federal Trade Commission shall not have any authority to use any funds which are authorized to be appropriated to carry out the Federal Trade Commission Act (15 U.S.C. 41 et seq.) for

tising proceeding "or in any substantially similar proceeding" based on a determination that such advertising is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Additionally, Section 11(c) provides that the Children's Advertising proceeding shall be suspended until such time as the Commission publishes in the Federal Register the text of the rule, including any alternatives, which the Commission proposes to promulgate, as required in Section 11 (a)(3). Section 11(c) also provides that, if further proceedings are commenced, the Commission must allow interested parties "a reasonable opportunity to present their views in accordance with section 18(b)(1)(B) of the Federal Trade Commission Act [formerly section 18(b)(2)] . . . , section 18(b)(1)(C) of such Act [formerly section 18 (b)(3)] . . . , and section 18(c) of such Act (15 U.S.C. § 57a(c))."

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fiscal year 1980, 1981, or 1982, under section 24 of such Act, as amended by section 17 and so redesignated in section 13, for the purpose of initiating any new rulemaking proceeding under section 18 of such Act which is intended to result in, or which may result in, the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

(c) The amendments made in subsection (a) shall take effect on the date of the enactment of this Act. The children's advertising proceeding pending on the date of the enactment of this Act shall not proceed further until such time as the Commission has complied with section 18(b)(1)(A) of the Federal Trade Commission Act, as amended by subsection (a)(3) and as so redesignated in section 8(a). In any such further proceeding, interested parties shall be given a reasonable opportunity to present their views in accordance with section 18(b)(1)(B) of the Federal Trade Commission Act, as so redesignated in section 8(a), section 18(b)(1) (C) of such Act, as so redesignated in section 8(a), and section 18(c) of such Act (15 U.S.C. 57a(c)).

The passage of Public Law No. 96-252 raises a significant and complex question of mootness. At present, the Commission has not published the text of a proposed rule. Thus, the Children's Advertising proceeding is currently suspended. It is not certain whether that proceeding will be recommenced at all. If it is recommenced, or if a substantially similar proceeding is commenced, the Commission must propose and publish the text of a rule which would be directed exclusively towards children's television advertisements that are deceptive within the meaning of Section 5 of the Federal Trade Commission Act. This would constitute a marked change from the suspended proceedings, which focused primarily on the alleged unfairness of children's advertising, and only secondarily on the alleged deceptiveness of that advertising. Such a substantial restriction on the scope of any future proceeding may well require publication of a proposed rule substantially different from the three elements of a rule upon which the Commission invited comment in its initial notice of proposed rulemaking (App. at D9). The future proceeding may involve fewer questions of fact than were addressed in the initial notice. (App. at D10-D15), or may raise entirely different issues of fact than were previously addressed.[2]

Kellogg has asked this Court to determine the proper standard for disqualification of an administrative official from a trade regulation rulemaking proceeding and to apply that standard to evidence adduced during that proceeding. However, the recent legislation which has made the future course and scope of the proceeding itself uncertain may also have made this case moot. The issue of

[2]Respondents acknowledge these changed circumstances in their Brief in Opposition. Br. Opp. at 15 n.13, 25.

mootness is a complex one. If subsequent legislation eradicates the injuries of which a party complains, the subsequent legislation makes the case moot. *Kremens v. Bartley*, 431 U.S. 119 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972). On the other hand, if subsequent legislation does not eliminate the controversy before the Court, that legislation does not give rise to mootness. *Brockington v. Rhodes*, 396 U.S. 41 (1969) (mootness found on other grounds). In the present case, it is currently unclear whether Section 11 of Public Law No. 96-252 changes the nature of the Children's Advertising proceeding sufficiently to render moot the controversy before this Court: whether Chairman Pertschuk should be disqualified for having prejudged issues of fact presented in that proceeding.

Under these circumstances, Kellogg suggests that further consideration of the mootness issue raised by the passage of Public Law No. 96-252 is appropriate. Kellogg therefore respectfully requests that this Court follow one of two courses:

1. Grant certiorari, vacate the judgment of the Court of Appeals, and remand the case to that Court for consideration of the question of mootness in light of the intervening legislation. *Carey v. Echevarria*, 429 U.S. 808 (1976); see, e.g., *Pierre v. United States*, 434 U.S. 962 (1977); *Edwards v. Healy*, 421 U.S. 772 (1975).

2. Grant certiorari and direct the parties to brief and argue, in addition to the questions presented by the petition, the question of mootness raised by the intervening legislation. *Preiser v. Newkirk*, 419 U.S. 894 (1974), vacated as moot, 422 U.S. 395 (1975).

If this Court does not agree with Kellogg's conclusion that the mootness question raised by the intervening legislation should be considered further, Kellogg suggests two other suitable dispositions of this case, depending upon how this Court resolves the mootness issue. If this Court finds the case moot, certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded to that court for entry of an order directing the District Court to dismiss the action as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). If, however, this Court finds that the case is not moot, certiorari should be granted and the case should be considered on its merits for the reasons presented by Kellogg in its Petition for Certiorari.

Respectfully submitted,

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